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No. 90-465

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE STATE OF WASHINGTON,
Cross-Petitioner,

v.

ASSOCIATED GROCERS, INC.,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

The Washington Supreme Court ruled that Section 82.04.270 of the Revised Code of Washington discriminated against petitioner in violation of the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the State Constitution by granting a tax exemption to petitioner's competitors that was not granted to petitioner. The state court nevertheless ruled, shortly before this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages*, No. 88-192, 110 S. Ct. 2238 (June 7, 1990), that petitioner was not entitled to a refund or other retrospective relief but that "the proper remedy consists solely of striking the offending tax exemption." Pet. App. 2a.[1]

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[1] Pet. App. refers to the appendix to the petition for writ of certiorari in No. 90-281.

We showed in our petition, No. 90-281, that the state court's ruling on remedy was flatly inconsistent with *McKesson* and the cases on which it was based, and we suggested that the Court may wish to consider a summary remand to allow the Washington Supreme Court to reconsider its ruling on remedy in light of that case. The respondent and cross-petitioner, the State of Washington, has not filed a brief in opposition or, indeed, made any response whatever with respect to the question presented in the petition. Instead, the state has filed a cross-petition under Rule 12.3 of this Court attacking (although it did not choose to do so by a timely petition of its own) the state court's decision striking down the discriminatory provision.

The cross-petition presents no issue worthy of this Court's review. The statute discriminated between taxpayers who compete with each other in the very activity that is the subject of the discriminatory tax. The state trial court explicitly found "that there is *no rational relationship* between the obvious discrimination against wholesalers and the explicit statement of legislative purpose" (Pet. App. 26a) (emphasis supplied). The Washington Supreme Court put the matter in somewhat different terms but the gist of its ruling, too, was that the statutory discrimination made no sense in light of the state legislature's purpose as repeatedly interpreted by that court.

STATEMENT

The material facts, which "are not in dispute" (Pet. App. 2a), and the procedural history of this case are set forth in our petition. The respondent and cross-petitioner has, however, attempted to sow confusion by repeatedly referring to petitioner's competitors as "retailers" (instead of "distributors," the term used in the statute and by the Washington Supreme Court) and by discussing a different tax provision, Wash. Rev. Code § 82.04.250,

which is not involved in this case and has no important bearing on the present issues.

The cross-petition discusses two different business and occupation taxes which are imposed by two different Washington statutes. Section 82.04.270, the provision involved in this case, is entitled **"Tax on wholesalers, distributors."** Pet. App. 39a. It imposes a tax both on wholesalers and on "distributors": firms that engage in the same function as wholesalers—distributing goods *to* retail outlets—but whose distribution does not involve any sale because the retail outlets happen to be owned by the distributor. The statute itself states the intent to impose—

> a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales.[2]

Pet. App. 39a. The other tax provision, Section 82.04.250, which is not involved in this case, imposes a separate tax on retail sales.

Petitioner engages only in wholesaling and pays only the tax under Section 270. Petitioner's customers, who are retailers, pay a separate tax on their retail sales under Section 250. Safeway, the firm used throughout this litigation as a contrasting example, is a vertically integrated business that both performs wholesale distribution functions and is a retailer. It competes both with petitioner and with petitioner's customers.[3] Since

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[2] This express declaration of legislative purpose is never even acknowledged in the State's cross-petition.

[3] Respondent's assertion (Cross Pet. 5) that "internal distributors, like Safeway, are not in competition with wholesalers [like petitioner]" was rejected by both state courts. See Pet. App. 2a ("Safeway . . . a competitor of [petitioner]"); Pet. App. 19a ("Safeway . . . is a competitor of [petitioner]").

it engages in both of the taxed activities (wholesale distribution and retailing), it is subject to both taxes.

Cross-petitioner's assertion (Cross Pet. 3) that Section 270, the Section at issue, imposes "an additional B&O tax on retailers" is an attempt either to confuse or to quarrel with the state statutory scheme as explicated by the state's own courts. It is clear and well established that the state statutory scheme imposes two taxes on an entity that is engaged in *both* the taxable activity of performing wholesale functions *and* the separate taxable activity of retailing. *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970). But contrary to the cross-petitioner's assertion, in that situation the Section 270 tax "is not imposed on the store or [retail] outlet, but upon the wholesaling function, that is, the *distribution* to two or more [retail] outlets." *Standard Oil Co. v. State*, 57 Wn.2d 56, 62, 355 P.2d 349, 353 (1960) (emphasis in original).

ARGUMENT

The cross petition presents no question warranting this Court's review. The state courts of Washington, including the state's highest court, first determined the intentions of the Washington legislature in enacting Section 270; on that matter, the Washington Supreme Court is, of course, the final authority. Having made that determination, the state courts then ruled that the discriminatory feature of Section 270, the exemption of distributors but not wholesalers from tax on their distribution of goods acquired from a tax-paying wholesale supplier, not only did not in any way serve but actually contravened the legislature's purpose, and was therefore a discrimination that could not survive even the lowest level of scrutiny under the Equal Protection Clause. That decision, grounded in the state courts' interpretation of the state legislature's purposes in this particular statute, was correct and raises no issues of general importance.

The test set forth by this Court is "whether . . . the legislative classification is rationally related to achievement of the statutory purposes." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981). The tax exemption at issue in this case fails that test, and notwithstanding cross-petitioner's effort to build an issue out of the way the Washington Supreme Court's opinion was crafted, that *is* what both the trial court and the Washington Supreme Court held.

The trial court was explicit:

> From the language of the statute itself and from the opinions of the appellate courts of this state construing this statute, it is absolutely clear that the purpose of the statute is to tax the two classes equally to neutralize any advantage inherent in organizations which have integrated the wholesaling functions into their operation.[4]
>
> * * * *
>
> In this case I find that there is no rational relationship between the obvious discrimination against wholesalers and the explicit statement of legislative purpose of equalizing taxes. Such discrimination is clearly contrary to the legislative purpose and appears to be the result of legislative oversight.

Pet. App. 26a.

The Washington Supreme Court was equally explicit about purpose:

> [S]ubsection (2) [of Section 270] announces a legislative intent "to impose a tax equal to the wholesaler's tax upon persons performing functions essen-

[4] The trial court found that Section 270 created one class of taxpayers including both wholesalers and others who perform wholesale functions (Pet. App. 22a). The mention of "two classes" in this passage was part of a further finding that, assuming arguendo that wholesalers and such distributors might be regarded as separate classes, there was no rational basis for distinguishing between them.

> tially comparable to those of a wholesaler." This expresses an intent to assure that the tax is identical for both subclasses within the class.

Pet. App. 6a. The Washington Supreme Court then held that the exemption at issue, which treats the members of this single class differently, violates the Equal Protection Clause: "Where, as here, there is but one class,[5] and the members of it are taxed differently, the statute must be declared unconstitutional." *Id.*

Cross-petitioner objects to this "one-class" formulation of the issue, insisting that the court should have treated wholesalers and others who perform wholesale functions as two classes and then asked whether there was a rational basis for distinguishing between classes. But this quibble is groundless: the Washington Supreme Court, in striking down a portion of a statute enacted by the state legislature, obviously *did* mean to rule that there was no good basis, in light of the statutory purpose, for distinguishing between wholesalers and others who perform wholesale functions. The statement that wholesalers and those who perform wholesale functions are members of a single class was plainly intended to *be* a statement that there was no basis for discriminating between them.

Indeed, this Court has used the same "one-class" formulation in analyzing discriminatory tax schemes under the Equal Protection Clause:

> The Equal Protection Clause . . . protects the individual from State action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

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[5] This construction of the statute was already well established Washington law. "This Court has consistently treated distributors and wholesalers as members of a single class under the statute [Section 270] and its forerunners." Pet. App. 6a (citing earlier cases).

Allegheny Pittsburgh Coal Co. v. County Commissioners, 488 U.S. 336, 345 (1989), quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). In using this formulation, the Court of course did not mean that it was irrelevant whether it was reasonable to tax A but not B; rather, the question of reasonableness was subsumed in the determination that A and B were members of a single class.

There is no reason for this Court to exercise its certiorari jurisdiction to comment on the way the Washington Supreme Court crafted its opinion. Nor is there any reason to review the Washington Supreme Court's decision on the equal protection question. That decision, which was grounded in the Washington court's longstanding interpretation of the legislative purpose embodied in a particular section of the state taxing scheme, was in essence that an unequal tax on wholesalers and others who perform wholesale functions was not "rationally related to achievement of the statutory purposes" in Section 270. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 463.

The issue here is *not* whether the Washington legislature could have had "any conceivable purpose" (Cross Pet. 8) for distinguishing wholesalers from distributors. Here, the Washington courts have determined the legislative purpose. There is no reason for this Court to accept cross-petitioner's invitation to wade into the state tax scheme, review the state courts' determination of the purpose of a state statute, or review the state courts' determination that, given their finding of actual purpose, the statute at issue denied equal protection to wholesalers who should have been treated equally with others who perform wholesale functions.

CONCLUSION

For the reasons stated in this brief and in our petition for a writ of certiorari, the cross-petition should be denied and the petition should be granted. The Court may wish to consider a summary remand to allow the Washington Supreme Court to reconsider its ruling on remedy in light of this Court's decision the following month in *McKesson*.

Respectfully submitted,

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